

Mr. William Innes, Merchant in London, Appellant.
 Messrs. Gibson and Balfour, Merchants in Edinburgh, Respondents.

The Respondents C A S E.

ON 12th December 1769, the Respondents, in Course of Trade, purchased two Bills of 300*l.* each of James Scott of Edinburgh, drawn by him upon Messrs. Annand and Colquhoun of London, at sixty Days Date.

A few Hours after this Transaction, Scott was led to doubt the Credit of Annand and Colquhoun, and therefore, to keep his own Credit with the Respondents, and prevent the Dishonour of these Bills, as well as of two others of 100*l.* each, of the same Date, drawn by him on the same Persons, but to different Holders, he wrote the following Letter to the Appellant Mr. Innes, inclosing a Remittance exactly equivalent to the Sum in the four Bills above-mentioned: "Mr. Innes, Dear Sir, By Disappointment of Remittances from Mr. Ebenezer Macculloch and Co. I have some Reasons to fear that Messrs. Annand and Colquhoun may be obliged to stop Payment, unless Mr. Annand, now here, can obtain the Securities he is labouring to get, viz. Lord Dumfries and George Young. I was so unlucky as this Day, before I heard of any Demur in their Affairs, to draw on Messrs. Annand and Colquhoun for 800*l.* in four Bills, as under, viz.

" To Order of Gibson and Balfour, at 60 Days Date,	£. 300
" To Order of the same, — 60 Days ditto,	300
" To Order of James Seton, — 60 Days ditto,	100
" To Order of Andrew Saint Clair, Esq; 60 Days ditto,	100
	£. 800

" I send you inclosed Johnston and Smith's Bill, forty Days Date, on Glyn and Co. for 800*l.* if they (*i. e.* Annand and Colquhoun) accept my Bills, and are going on, I beg you will put them in Possession of this 800*l.* Bill; if not, I have directed Mr. Colquhoun to send them to your good Self, if the Holders will take that Trouble; and I beg you will accept them for my Honour."

This Letter bore Date also the 12th of December, and on the 13th Ebenezer Macculloch and Co. of Edinburgh became Bankrupt. Annand and Colquhoun were so deeply connected with them, that it was immediately known that they must also be Bankrupts; the Respondents therefore applied to Scott to secure the Payment of the Bills purchased the preceding Day. He told them that he had made a Remittance for that Purpose, and read from his Letter-Book the above Letter to the Appellant.

This satisfied the Respondents, who might easily then have secured their Money out of Scott's Effects. Scott, upon the 14th December 1769, wrote again to the Appellant, in these Terms: " I wrote you last Post, just as the Post was going, and I hope you will excuse the Hurry I was in. My Letter inclosed you Johnston and Smith's Bill on Glyn and Halifax for 800*l.* at 40 Days Date, which you will please (if Messrs. Annand and Colquhoun are going on) deliver to them, if not, you will be so good as credit my Account for the same, and accept, for Honour, two Bills I drew same Date to Messrs. Gibson and Balfour of 300*l.* each, at 60 Days Date; one Bill to Order of James Seton at 60 Days Date, for 100*l.* and one Bill to Andrew Saint Clair, Esq; at 60 Days Date, for 100*l.* Sterling; in all 800*l.* the Holders whereof, Messrs. Annand and Colquhoun will inform you of; or Messrs. Gibson and Balfour, Mr. James Seton, and Mr. Andrew Sinclair, will direct their Correspondents to call on you with them, as I have applied to them for that Purpose."

The Respondents sent one of the Bills purchased from Scott to Biggar and Hamilton, and the other to Bogle and Scott of London; and on the 14th December, the Day after Scott the Drawer had shewn them his Letter to the Appellant, they wrote to both these Houses to the same Effect, viz. " Should a Remittance in our last on Annand and Colquhoun be refused Acceptance, you'll present it to William Innes for Honour of the Drawer."

These Letters are direct Evidence, that it was on the Faith of the Remittance made by Scott the Drawer to the Appellant Innes that the Respondents did not proceed to require Security from the Drawer, when they understood the Situation of the Drawees.

Innes the Appellant wrote in Answer to Scott's Letter of the 12th as follows: " I wrote you the 11th, and have your Favour of the 12th Instant, and I am sorry for what you write about your Fears regarding Annand and Co. in case they do not find some Securities and Assistance. I notice you had drawn on them to Gibson and Co. 60 Days Date, 600*l.* to James Seton, 100*l.* and to Andrew Saint Clair 100*l.* 200*l.* which you desire I may accept for your Honour, which I shall do, if necessary; and I have Johnston and Co.'s Bill on Glyn and Co. due January 24, 800*l.* to your Credit. I see you desire I may give Annand and Co. said Bill, if they are going on; as to which, I shall consider. I was out of Town To-day, and have not seen them, nor heard of them."

As Macculloch's Bankruptcy occasioned that of Annand and Colquhoun, so their Bankruptcy affected Scott the Drawer of the Bills; and he also became Bankrupt a short Time afterwards: But, whilst his Affairs were in an undecided Situation, the Respondents offered to support his Credit, provided Innes the Appellant would honour Scott's Bills as they became due, and accept his Draughts to their Order. This Scott intimates to Innes in his Letter of the 14th December, desiring him to write the Respondents, that he would accept the Proposal by Course of Post. But this Transaction did not take Place; Innes not having agreed to the Proposal, and it has no relation to the present Question.

Scott

23d December
1769.

Scott the Drawer having shewed the Respondents *Innes's* Letter of the 16th *December*, wherein he promised to accept the Bills for the Honour of the Drawer, if necessary; and acknowledged the Remittance on *Glyn* and *Co.* for 800*l.* to answer these Bills; they, of this Date, wrote *Innes* to the following Purpose: "Mr. *Scott* shewed your Letter of the 16th, agreeing to accept two Bills he had drawn on *Annand* and *Colquhoun* to our Order, at sixty Days Date, on the 12th, for 300*l.* each, if necessary, for his Honour, which we have duly noted; and are, &c."

28th December
1769.

Nevertheless, *Innes* did not accept the Bills, and the Accotints of his Refusal came to *Edinburgh* on the very Day that this Letter was written; therefore the Respondents wrote to *Innes* of this Date, acquainting him, that they considered him their Debtor in the Bills, both on the Grounds of the Remittance made to him to answer them, and the Faith of his own Letter of the 16th, promising to accept them for the Drawer's Honour, if necessary:—That they had attached his Effects in *Edinburgh* by Arrestment, in order to found the Jurisdiction, and had commenced a Suit against him:—That they had done this with Regret, and in such a Manner, that the Appellant's Credit should not suffer; and that by giving Bail to the Action, he would have Access to his Effects arrested.

10th August
1770.
1st Interlocutor
appealed from.

This Letter produced a Correspondence between *Innes* and the Respondents, in which it appeared, that *Innes* had applied the 800*l.* which was remitted by *Scott* to answer the Bills in Question, to his own Use, *Scott* being his Debtor;—and he flatly refused Payment of the Bills, or even to submit the Matter to Merchants; and therefore, the Respondents proceeded in their Action, which was brought in the Court of Session, and came before the Lord *Coulston* Ordinary, who, after a full Hearing at the Bar, and ordering Memorials for both Parties, pronounced the following Interlocutor: "The Lord Ordinary having considered the Memorials for both Parties, finds it proved by *James Scott's* Letters of the 12th and 14th *December* 1769, that the Bill for 800*l.* Sterling on *Glyn* and *Co.* was transmitted to the Defender under Trust, that he should deliver the same to *Annand* and *Colquhoun*, if they should accept his Bills on them payable to the Pursuers, and were still going on; and, if not, that he should credit his Account with said Bill; and, for his Honour, accept the said Bills drawn on *Annand* and *Colquhoun*, payable to the Pursuers: Finds it instructed by the Defender's Letter to *Scott*, dated [the 16th *December* 1769, that he did accept and undertake the Trust, in Terms above-mentioned; and did thereby become bound, in case it should be necessary, to accept the Bills due to the Pursuers; and therefore, in respect it is proved by the said Letters of the 14th *December*, and the other Letters produced, that *Scott* had notified to the Pursuers the Orders he had given to the Defender, and that in case of Necessity they were to apply to him for Acceptance and Payment: Finds, That in these Circumstances, it was not competent to the Defender to counteract the Orders of his Constituent, nor to refile from the Obligation he had come under by his Letter of the 16th *December*; and therefore repels the Defence, and decerns, superceding Extract till the 15th *November* next."

21st December
1770.
2d Interlocutor
appealed from.

A Representation was preferred against this Interlocutor, and Answers being put in; his Lordship refused the Representation, and adhered to his former Interlocutor.

Afterwards the Appellant preferred a Petition to all the Judges, in which he argued, That neither the Letter of the 12th of *December*, nor the Answer of the 16th, agreeing to accept the Bills in question, if necessary, could establish a Ground of Action to the Pursuers, (now Respondents) for that they were not privy to the Transaction:—That the Remittance of 800*l.* in the Bill upon *Glyn* and *Hallifax* is to be considered as made by *Scott* the Constituent to *Innes* the Agent, to answer the Constituent's Demands: That although the Letters of Correspondence direct the particular Purpose to which it should be applied, yet no Right of Action, no *jus crediti* in the Person to whom the Agent is directed to make the Payment, is thereby established:—That the Constituent at all Times may recal such Order or Direction; and that the Person, in whose Favour the Order is conceived, has no Power to oblige the Agent to give up the Order, which Order can be the only Foundation of his Action:—That if this hold in the general, that the Constituent may recal the Order, so in particular Cases; upon a Change of Circumstances, for Example. The Agent, after having accepted the Order, may, nevertheless, draw back and refuse to execute it; nor would be compellable, either at the Instance of the Constituent himself, or of the Person in whose Favour the Order was conceived.

This Doctrine was illustrated by the Case which has actually happened, *viz.* An Order, by a Person reputed solvent, to apply a certain Sum of Money, the Order acknowledged by the Agent, still under the Idea of the Constituent's Solvency, but before the Application of the Money is made the Constituent becomes Bankrupt; this, it was argued, would relieve the Agent from his Promise, if he had none of the Bankrupt's Funds in his Hands; which was the Situation of the Agent in this Case, he being Creditor to the Constituent in a larger Sum than that remitted.

It was further argued, That the Appellant's Letter of the 16th *December* was not a direct Obligation, but a mere Resolution, which he had a Right to alter upon a Change of Circumstances: That it was like a Promise, to lend so much Money, which the Promisor could not be bound to fulfil, if the Promisee became Bankrupt before the Loan was completed by Delivery; and therefore, as this could found no Action to the Promisee, much less could it to Third Parties not privy to the Promise.

Fountainhall,
July 1697.
Inglis verf.
Clarke.

In Support of this Doctrine, a Case was cited, to this Purpose. *Inglis* and *Macgie* were Creditors to *Stonebrower*, Merchant in *London*. *Stonebrower* sent a Bill to *Clark* in *Edinburgh*, signifying that it was to pay Part of *Macgie's* Debt. *Inglis* arrested the Money in *Clark's* Hands; upon which *Macgie* brought his Action, stating that the Order to *Clark* transferred the Property of the Money to him; and, therefore, that it was not attachable by *Stonebrower's* Creditors. *Inglis* pleaded, that *Stonebrower* might, at any Time before Delivery, have countermanded the Order; and, therefore, that the Property was not transferred. The Court found that the Property was not transferred till Delivery.

Another Case was cited for the same Purpose, from *Forbes*, 16th *January* 1706, Lord *Rofs* verf. *Gray*.

Upon the Principles of these Determinations it was contended, That the Creditors of *Scott*, the Constituent, might have attached the £. 800 remitted, and would have been found intitled to it in a Suit between them and the Respondents, for whose Behoof it was lodged; and therefore the Agent, who could not attach the Money in his own Hands, had a Right to retain it, to answer a pre-existing Debt due to him from the Constituent, and would also be preferred to the Person for whose Behoof the Remittance was made.

To this Petition Answers were put in by the Respondents, in which they assumed as Matter of Fact, 1st, That the 800 l. in the Bill to Glyn and Company was remitted to the Appellant for the special Purpose of answering the Bills in question, &c. which was evident from Mr. Scott's Letters of the 12th and 14th December.—2^d, That from the Appellant's Letter, of the 16th December, it is evident he received this 800 l. in Consideration of which he promises to accept the Bills in question, if necessary, that is, if not accepted by Annand and Colquhoun.—3^d, That it was owing to the Intimation of this, made to the Respondents on the 13th of December by Scott, and upon the Credit of it, that the Respondents relied, and did not then insist for Security from Scott, for their Relief in the Event of Annand and Colquhoun becoming Bankrupt, which they had Reason to believe would follow Macculloch's Bankruptcy; or, afterwards, to proceed to attach Scott's Effects for the Bills in question.—4th, That in consequence of the Respondents relying upon Scott's Intimation of the 13th December, they did the Day following write to their Correspondents, the Holders of the Bills in question, in London, desiring them, if the Drawees did not accept the Bills, to present them to Innes, the Appellant, who would accept them for the Honour of the Drawer.

From these Facts the Respondents argued, in Contradiction to the Doctrine laid down by the Appellant, That where one delivers Money to another to be paid to a Third Person, the Receipt of the Money, under the Condition of paying it, creates an Obligation upon the Receiver, at the Suit of the Person for whose Behoof the Delivery was made.—That this requires no Privity in the Third Person; for that, as the Transaction was made purely for his Behoof, the Law will presume his Consent, and that Presumption, with the Delivery of the Money, creates the Obligation between the Agent and the Third Party.—That this holds, *a fortiori*, from the Intimation made by Scott on the 13th December, of the Remittance to his Agent, and the special Purpose of that Remittance.—That a Privity was thereby created, and the Case became the same as if Scott had given the Respondents a direct Order upon his Agent, the Appellant, for the Money; and that he had accepted the same, as he acknowledged the Remittance, and promised Acceptance of the Bills by his Letter of the 16th December.—That therefore it was unnecessary to argue upon the general Powers of a Constituent to recal the Orders given to his Agent; for that in this Case, after the Intimation upon which the Respondents relied, Scott, the Constituent, could not recal the Order given to his Agent. 2^{dly}, In point of Fact, and independant of the Intimation, the Order never was recalled to this Hour.

And the Respondents argued, That if a Creditor of Scott's had attached this Money in the Appellant's Hands, the Respondents, in a Competition with that Creditor, must have recovered the Money upon this plain Ground, that by the Intimation of the Purpose for which the Remittance was made, the Fund became appropriated to their Payment only.

In Support of this Doctrine, the Respondents cited a recent Case very solemnly determined. Trotter sent a Cargo of Sugars from Jamaica, consigned to Aiton at Glasgow and one Mitchell in Leith. The Bills of Lading, &c. were sent to Aiton, and an Order to apply the Proceeds of the Sugars to the Payment of certain Creditors, Stalker being one: Before the Sugars arrived, Stalker made an Arrestment in Aiton's Hands; and Aiton, when they arrived, applied the Proceeds according to his Order, proportioning the Fund to the Creditors, *pro rata* of their Debts, without any Regard to Stalker's Arrestment.—All the Creditors agreed to accept the Dividend, except Stalker, and Aiton gave his own Security to them for their Shares; but, before Payment, Stalker executed another Diligence of Arrestment, and brought Suit against Aiton upon both Arrestments. The Lord Ordinary, before whom this Cause came, found, That the First Arrestment could not affect the Goods, because they were not in Possession of the Arrestee, when the Arrestment issued. And, with respect to the Second Arrestment, he found, that Aiton was not interpellated by the said Arrestment from making Payment to the Creditors in pursuance of his Obligation. And to this Interlocutor the Court, on advising Petition and Answers, adhered.

The Appellant in the Argument endeavoured to evade the Force of this Judgment, by alledging that the Obligation granted by Aiton to the Creditors, created a *jus crediti* to them; which neither Trotter, the Debtor, could defeat by recalling the Order, nor any one Creditor defeat by proceeding to Execution against the Fund. But the Answer made was, That Aiton being only an Agent for Trotter, the Obligation granted by him, in so far as it related to the different Interests of the Creditors among themselves, was no more than an Intimation to them of the Purpose for which the Fund was lodged in his Hand.—That, by granting such an Obligation, Aiton became personally liable to the Creditors; but such Obligation could never defeat the legal Process of a Creditor in Execution, unless upon the Principle contended for in this Case, that this was a Fund appropriated for special Purposes, which behooved to be accomplished, after Intimation to all the Creditors, notwithstanding of Execution sued out by a particular Creditor. And, if the Intimation by the Debtor's Trustee could have this Effect, Intimation by the Debtor himself could certainly have no less.

To the Argument made use of by the Appellant, That as a Creditor attaching the Money in his Hand, would have recovered it in a Suit with the Respondents, for whose Behoof it was lodged; so he, being a Creditor to Scott, and not in the Capability to attach in his own Hands, might retain and apply it to the Payment of his own Debt: It was answered upon the Grounds already explained, that the Premises were not true; for, that a Creditor attaching a Fund, lodged for a particular Purpose, would not be preferred to the Person for whose Behoof it was lodged, provided Intimation had been made to him, as in this Case. And the Premises being untrue, the Inference is still less true: For that a Creditor, who receives a Sum of Money from his Debtor for a particular Purpose, must apply it to that Purpose, and not to the Discharge of his own Debt. And a Decision was quoted so late as the 1767, which goes entirely upon this Principle. Dunlop and Company at Glasgow had a Credit with Coutts and Company at Edinburgh.—Dunlop had also a particular Credit with Coutts and Company.—Dunlop made a Remittance to be placed to the Company Accompts: But Coutts and Company placed it to Dunlop's particular Accompt, and advised him of it.—He answered, that since it was so, it might stand.—However, Dunlop became Bankrupt, and the Question came to be tried between Dunlop's Partners and Coutts'; and the Court found, that the Remittances fell to be placed to the Company Accompt, and not to Dunlop's particular Accompt, because it had been so ordered in the Advice, which Coutts and Company could not alter to the Prejudice of the Company.

Another Decision was also quoted, so recent also as to be in no Book of Reports, Stewart *vers* Bisset.—The Case was, Macdonald accepted a Bill for 18 l. at 3 Days Date to Macbain, who indorsed the Bill to Coutts and Company, and they indorsed it to Stewart.—Stewart demanded Payment some time after, and was told by Macdonald, the Debtor, that he had remitted the Sum in the Bill to Bisset, to be paid to Stewart the Holder of the Bill.—Bisset acknowledged that he had received from Macdonald, the Debtor, Nine Pounds at one Time, and a Remittance

23d December
1769.

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This Letter produced a Correspondence between *Innes* and the Respondents, in which it appeared, that *Innes* had applied the 800 *l.* which was remitted by *Scott* to answer the Bills in Question, to his own Use, *Scott* being his Debtor;—and he flatly refused Payment of the Bills, or even to submit the Matter to Merchants; and therefore, the Respondents proceeded in their Action, which was brought in the Court of Session, and came before the Lord *Coulston* Ordinary, who, after a full Hearing at the Bar, and ordering Memorials for both Parties, pronounced the following Interlocutor: "The Lord Ordinary having considered the Memorials for both Parties, finds it proved by *James Scott's* Letters of the 12th and 14th *December* 1769, that the Bill for 800 *l.* Sterling on *Glyn* and *Co.* was transmitted to the Defender under Trust, that he should deliver the same to *Annand* and *Colquhoun*, if they should accept his Bills on them payable to the Pursuers, and were still going on; and, if not, that he should credit his Account with said Bill; and, for his Honour, accept the said Bills drawn on *Annand* and *Colquhoun*, payable to the Pursuers: Finds it instructed by the Defender's Letter to *Scott*, dated [the 16th *December* 1769, that he did accept and undertake the Trust, in Terms above-mentioned; and did there- by become bound, in case it should be necessary, to accept the Bills due to the Pursuers; and therefore, in respect it is proved by the said Letters of the 14th *December*, and the other Letters produced, that *Scott* had notified to the Pursuers the Orders he had given to the Defender, and that in case of Necessity they were to apply to him for Acceptance and Payment: Finds, That in these Circumstances, it was not competent to the Defender to counteract the Orders of his Constituent, nor to refile from the Obligation he had come under by his Letter of the 16th *December*; and therefore repels the Defence, and decerns, superceding Extract till the 15th *November* next."

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This Doctrine was illustrated by the Case which has actually happened, *viz.* An Order, by a Person reputed solvent, to apply a certain Sum of Money, the Order acknowledged by the Agent, still under the Idea of the Constituent's Solvency, but before the Application of the Money is made the Constituent becomes Bankrupt; this, it was argued, would relieve the Agent from his Promise, if he had none of the Bankrupt's Funds in his Hands; which was the Situation of the Agent in this Case, he being Creditor to the Constituent in a larger Sum than that remitted.

It was further argued, That the Appellant's Letter of the 16th *December* was not a direct Obligation, but a mere Resolution, which he had a Right to alter upon a Change of Circumstances: That it was like a Promise, to lend so much Money, which the Promisor could not be bound to fulfil, if the Promisee became Bankrupt before the Loan was completed by Delivery; and therefore, as this could found no Action to the Promisee, much less could it to Third Parties not privy to the Promise.

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Another Case was cited for the same Purpose, from *Forbes*, 16th *January* 1706, Lord *Ross* verif. *Gray*.

Upon the Principles of these Determinations it was contended, That the Creditors of *Scott*, the Constituent, might have attached the £. 800 remitted, and would have been found intitled to it in a Suit between them and the Respondents, for whose Behoof it was lodged; and therefore the Agent, who could not attach the Money in his own Hands, had a Right to retain it, to answer a pre-existing Debt due to him from the Constituent, and would also be preferred to the Person for whose Behoof the Remittance was made.

To

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From these Facts the Respondents argued, in Contradiction to the Doctrine laid down by the Appellant, That where one delivers Money to another to be paid to a Third Person, the Receipt of the Money, under the Condition of paying it, creates an Obligation upon the Receiver, at the Suit of the Person for whose Behoof the Delivery was made.—That this requires no Privity in the Third Person; for that, as the Transaction was made purely for his Behoof, the Law will presume his Consent, and that Presumption, with the Delivery of the Money, creates the Obligation between the Agent and the Third Party.—That this holds, *a fortiori*, from the Intimation made by Scott on the 13th December, of the Remittance to his Agent, and the special Purpose of that Remittance.—That a Privity was thereby created, and the Case became the same as if Scott had given the Respondents a direct Order upon his Agent, the Appellant, for the Money; and that he had accepted the same, as he acknowledged the Remittance, and promised Acceptance of the Bills by his Letter of the 16th December.—That therefore it was unnecessary to argue upon the general Powers of a Constituent to recal the Orders given to his Agent; for that in this Case, after the Intimation upon which the Respondents relied, Scott, the Constituent, could not recal the Order given to his Agent. 2^{dly}, In point of Fact, and independant of the Intimation, the Order never was recalled to this Hour.

And the Respondents argued, That if a Creditor of Scott's had attached this Money in the Appellant's Hands, the Respondents, in a Competition with that Creditor, must have recovered the Money upon this plain Ground, that by the Intimation of the Purpose for which the Remittance was made, the Fund became appropriated to their Payment only.

In Support of this Doctrine, the Respondents cited a recent Case very solemnly determined. Trotter sent a Cargo of Sugars from Jamaica, consigned to Aiton at Glasgow and one Mitchell in Leith. The Bills of Lading, &c. were sent to Aiton, and an Order to apply the Proceeds of the Sugars to the Payment of certain Creditors, Stalker being one: Before the Sugars arrived, Stalker made an Arrestment in Aiton's Hands; and Aiton, when they arrived, applied the Proceeds according to his Order, proportioning the Fund to the Creditors, *pro rata* of their Debts, without any Regard to Stalker's Arrestment.—All the Creditors agreed to accept the Dividend, except Stalker, and Aiton gave his own Security to them for their Shares; but, before Payment, Stalker executed another Diligence of Arrestment, and brought Suit against Aiton upon both Arrestments. The Lord Ordinary, before whom this Cause came, found, That the First Arrestment could not affect the Goods, because they were not in Possession of the Arrestee, when the Arrestment issued. And, with respect to the Second Arrestment, he found, that Aiton was not interpellated by the said Arrestment from making Payment to the Creditors in pursuance of his Obligation. And to this Interlocutor the Court, on advising Petition and Answers, adhered.

The Appellant in the Argument endeavoured to evade the Force of this Judgment, by alledging that the Obligation granted by Aiton to the Creditors, created a *jus crediti* to them; which neither Trotter, the Debtor, could defeat by recalling the Order, nor any one Creditor defeat by proceeding to Execution against the Fund. But the Answer made was, That Aiton being only an Agent for Trotter, the Obligation granted by him, in so far as it related to the different Interests of the Creditors among themselves, was no more than an Intimation to them of the Purpose for which the Fund was lodged in his Hand.—That, by granting such an Obligation, Aiton became personally liable to the Creditors; but such Obligation could never defeat the legal Process of a Creditor in Execution, unless upon the Principle contended for in this Case, that this was a Fund appropriated for special Purposes, which behooved to be accomplished, after Intimation to all the Creditors, notwithstanding of Execution sued out by a particular Creditor. And, if the Intimation by the Debtor's Trustee could have this Effect, Intimation by the Debtor himself could certainly have no less.

To the Argument made use of by the Appellant, That as a Creditor attaching the Money in his Hand, would have recovered it in a Suit with the Respondents, for whose Behoof it was lodged; so he, being a Creditor to Scott, and not in the Capability to attach in his own Hands, might retain and apply it to the Payment of his own Debt: It was answered upon the Grounds already explained, that the Premises were not true; for, that a Creditor attaching a Fund, lodged for a particular Purpose, would not be preferred to the Person for whose Behoof it was lodged, provided Intimation had been made to him, as in this Case. And the Premises being untrue, the Inference is still less true: For that a Creditor, who receives a Sum of Money from his Debtor for a particular Purpose, must apply it to that Purpose, and not to the Discharge of his own Debt. And a Decision was quoted so late as the 1767, which goes entirely upon this Principle. Dunlop and Company at Glasgow had a Credit with Coutts and Company at Edinburgh.—Dunlop had also a particular Credit with Coutts and Company.—Dunlop made a Remittance to be placed to the Company Accompts: But Coutts and Company placed it to Dunlop's particular Accompt, and advised him of it.—He answered, that since it was so, it might stand.—However, Dunlop became Bankrupt, and the Question came to be tried between Dunlop's Partners and Coutts'; and the Court found, that the Remittances fell to be placed to the Company Accompt, and not to Dunlop's particular Accompt, because it had been so ordered in the Advice, which Coutts and Company could not alter to the Prejudice of the Company.

Another Decision was also quoted, so recent also as to be in no Book of Reports, Stewart vers. Bisset.—The Case was, Macdonald accepted a Bill for 18 l. at 3 Days Date to Macbain, who indorsed the Bill to Coutts and Company, and they indorsed it to Stewart.—Stewart demanded Payment some time after, and was told by Macdonald, the Debtor, that he had remitted the Sum in the Bill to Bisset, to be paid to Stewart the Holder of the Bill.—Bisset acknowledged that he had received from Macdonald, the Debtor, Nine Pounds at one Time, and a

Remittance

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Remittance of Nine Pounds more, to be employed in the Payment of the Bill: But that *Macdonald* owed him Money, and was become a Bankrupt; and, therefore, that he had a Right to retain the Money, and apply it to the Payment of his own Debt. And, it is said, upon an Action brought, the Lord Ordinary was of this Opinion: But the Court altered the Interlocutor, and decreed *Bisset* to apply the Money to the precise Purpose for which it had been lodged in his Hands.

In Answer to the Cases quoted by the Appellant, *Inglis* vers. *Clark*, and Lord *Ross* vers. *Gray*, it was argued, That the Principles of the Decisions did not apply to the present Case; for that in these Cases, the Appropriation of the Fund, was not so compleat as to afford a *jus crediti* to any particular Creditor, because no Intimation had been made by the Debtor to any Creditor that such a Fund had been lodged for his Behoof, nor had the Agent in whose Hands the Funds were lodged declared his Acceptance of the Deposit, and Agreement to apply it to the special Purpose; whereas in this Case, not only had the Debtor intimated to the Respondents that he had lodged and appropriated a Fund for their particular Use and Behoof, but also the Agent or Trustee had confessed the Delivery, and consented to the special Appropriation.

And therefore this Case was exactly a Deposit in the Appellant's Hands, which he behooved to apply for the precise Purpose for which it was made, and for that only; and upon this Head, the Respondents relied upon Texts of the Civil Law directly in point, viz. L. 11. Cod. "*Depositi si quis vel pecunias vel res quasdem per depositionis acceperit titulum das volenti ei qui deposuit reddere illico omnibus modis compellatur, nullamque compensationem vel deductionem vel doli exceptionem opponat.*" And to the same Purpose, L. 14. Cod. § 1. Cod. *De compensationibus* was also quoted.

Afterwards the Petitioner (now Appellant) gave into Court a Reply to the Respondent's Answer, wherein he endeavoured to change his Ground, and endeavoured to represent the Case as a fraudulent Connivance between *Scott* and the Respondents to defraud him of this Money.—That at the Time when *Scott* drew these Bills upon him he was on the Brink of a total Bankruptcy, and that he, with the Concurrence of the Respondents, endeavoured to draw the Appellant into great Advances.—This Idea is taken from *Scott's* Letter to the Appellant of the 14th September, in which are these Words: "As I have sundry Bills on Messrs. *Annan* and *Colquhoun*, now running and accepted, Messrs. *Gibson* and *Balfour* propose to lend me their Assistance on this Occasion; and say, if you will retire my Bills as they become due, and accept my Draughts to their Order, and write them a Letter to that Purpose in course of Post, and that you will do so, they will assist and enable me to supply you with good Remittances, to keep you fully remitted."

This Letter the Appellant compares with one from the Respondents to him dated December 23d, in these Words. "Sir, Mr. *James Scott* of this Place having applied to us for some Assistance in the present unsettled Situation of *Scott's* Bills in your Place, to enable you to retire his sundry Engagements in *London*, we will with the greatest Chearfulness comply with his Request on receiving a Letter from you, obliging yourself to accept his Bills on you for as large a Sum as he shall remitt you, or we shall do on his Account. This we are persuaded will be much for the Honor and Interest of Mr. *Scott's* Friends in *London*; and as he is now contracting his Affairs and calling in his Funds, he will be very soon out of this Dilemma. Mr. *Scott* shewed us your Letter of the 16th, agreeing to accept two Bills he had drawn on *Annan* and *Colquhoun* to our Order at 60 Days Date from the 12th per 300 l. each, if necessary for his Honor; which we have duly noted, and are, &c."

"P. S. Messrs. *Annan* and *Colquhoun* have covered themselves greatly in their Concerns with *Macculloch* and *Co.* by Arrestments."

The Petitioner insisted that this Letter was a Device to draw him in: That he had wrote to *Scott* of the 18th of December, refusing to have any Thing to do with *Scott's* Bills running on *Annan* and *Colquhoun*.—That this Letter would in the Course of Post arrive at *Edinburgh* on the 22d.—That the Letter from the Respondents was concerted between *Scott* and them in consequence of it. That this was a Fraud on their Part, as they must be presumed to know the State of *Scott's* Affairs, who became a Bankrupt a few Days after.—That at the same Time that they were endeavouring to represent *Scott's* Affairs as retrievable, and to persuade *Innes* the Appellant to support him, they were themselves securing their own Payment by attaching his Effects.

The plain Answer to this new Ground of Argument, was, That it had no Sort of Relation to the present Question; *Scott's* Request to the Appellant, to take up his running Bills upon *Annan* and *Colquhoun*, the Appellant refusing to do so in his Letter the 18th December, and the Respondents Letter to him of the 23d, endeavouring to persuade him to support *Scott*, is a Transaction totally different from the two Bills in question, to pay which a specific Remittance was made, and a specific Assent returned to accept these Bills if necessary, i. e. if not accepted and paid by *Annan* and *Colquhoun*.

2dly, It was argued, that this Notion of a Fraud intended, carried a direct Absurdity on the Face of it. It supposes that the Respondents believed the Appellant, who had Access to know the Situation of *Annan* and *Colquhoun's* Affairs better than they, because he lived on the Spot, would take their Word for the Situation of those Gentlemen against the Evidence of his own Senses.—In fact, *Annan* and *Colquhoun* stopt Payment upon the 18th in *London*. The Accounts of their Bankruptcy arrived in *Edinburgh*, not on the 22d, but on the 23d; and the Respondents had wrote their Letter early on the 23d before the Post arrived, and had given it to Mr. *Scott* to be transmitted with his Letters to the Appellant.—It happened singularly enough that *Scott* was on that very Day, and at that very Hour when the Post arrived, inclosed as a Juryman on the Trial of *Mungo Campbell*, for the Murder of the Earl of *Eglinton*, and the Letter could not be got back, otherwise it is impossible to suppose the Respondents would have wrote favourably of *Annan* and *Colquhoun's* Circumstances to the very Place from which, and the very Man from whom, they had just received an Account of the Bankruptcy of those Gentlemen.

And with respect to *Scott's* Situation, they said no more in that Letter than the Truth; he was much hurt indeed by *Macculloch's* Bankruptcy, and the consequential Bankruptcy of *Annan* and *Colquhoun*; yet, still he might have stood it out, had his Friend Mr. *Innes* supported him, and had it not been for the peculiar Situation of his Family.—His Wife's Trustees took the Alarm, and in their over officious Zeal to secure her Interest, brought all his Creditors upon him at once, which compleated the Catastrophe.—In this Situation the Respondents were obliged to proceed to Execution with the other Creditors, for Debts not otherwise secured; but so far from attempting to secure the Debt in question by Arrestment, they have trusted entirely to the Security they had by the Bills remitted to Mr. *Innes* for their Payment.

Upon

14th February
1771.
Interlocutor
appealed from.

Upon this Argument, the Court pronounced the following unanimous Interlocutor of this Date. "The Lords having advised this Petition with the Answers, Replies and Duplies, they adhere to the Lord Ordinary's Interlocutor reclaimed against, and refuse the Desire of the Petition: And in respect that the Replies for the Defender *William Innes*, contain many unjust and injurious Reflections against the Characters of the Pursuers; therefore find the Defender *William Innes* liable in Expences of Process, and decern, and appoint an Account thereof to be given in."

13d February
1771.
Interlocutor
appealed from.

Afterwards an Account being given in, amounting to 39*l.* Sterling and upwards, besides the Dues of extracting the Decree, the Lords of Session, on 23d February 1771, pronounced the following Interlocutor: "Having advised the said Account of Expences, they modify the same to 25*l.* Sterling in full, including Agent Fee, for which they decern against *William Innes* Defender, and also decern against him for the Expence of extracting the Decree, as the same shall be certified by the Collector of the Clerk's Dues."

From these Interlocutors of the Lord Ordinary, and of the Court, Mr. *Innes* has thought proper to enter his Appeal, praying that they may be reversed; but it is hoped that they will be affirmed with Costs, for the following, amongst other

R E A S O N S :

- I. The Bills were originally purchased upon the Credit of the Drawer, and he and the Drawees, at the Time of the Purchase, both considered as solvent, and in full Credit. But that very Day, Accounts arrived that the Drawees Credit was sinking. It is not to be supposed, that if the Respondents had been informed of this before they purchased the Bills, they would have risked their Money on so precarious a Bottom.—The Drawer was so sensible of this, that he thought himself bound to procure a good Remittance to answer those Bills, he sent it to his Agent in *London*, expressing for what Purpose it was sent, and desiring him to accept the Bills for his, the Drawer's Honour, if not accepted by the Drawees.—Next Day it comes to be certain that the Drawees must be bankrupt, by the Bankruptcy of *Macculloch* their Correspondent. The Respondents are alarmed, they go to the Drawer, and demand how he has provided for the Payment of the Bills. He shews them the Letter he had wrote to his Agent in *London*, and the Remittance he had made to answer these Bills. Upon this they rest satisfied, and the next Day after they write to the Holders of the Bills to apply to this Agent for Acceptance and Payment.—This it is contended would of itself create to them a *jus crediti*, upon the specific Sum remitted, and they would recover it in a Suit with any Creditor of the Drawer who had attached it in the Hands of the Agent.
 - II. The Principles and Precedents referred to in the Argument must apply *a fortiori* to a Question between the Respondents and the Person in whose Hands this Money was lodged, for the special Purpose of paying the Bills in Question. Another Creditor, ignorant of the Transaction, and the special Purpose for which the Money was lodged, might have some Colour of Reason to alledge that he had a Right to attach his Debtor's Money wherever he found it; and that his legal Process could not be injured by any private Agreement between his Debtor and another Creditor. Yet, even in that Case, the Intimation of an Appropriation by the Debtor would transfer the Property in a Question of Commerce, and defeat the Effect of legal Process, executed after Intimation; and therefore the Agent himself, supposing him in the most favourable Circumstances of any Creditor, could much less divert the Application of the Money, either to pay any other Creditor than him for whose Behoof the Remittance was made, or to set it off against a Debt due to himself.
 - III. For the Consequence of this in commercial Transactions would be, That a Merchant might get the most extensive Credit upon the Faith of Funds remitted to a distant Place; and yet, if the Agent to whom those Funds were remitted had it in his Power to set them off against his own real or pretended Debts, the Person who furnished the Credit would be disappointed, against the true Principles of all commercial Dealings; and in this Case, it was in full Reliance upon the Remittance made to the Appellant, that the Respondents did not proceed to secure themselves, which they could easily have done, so soon as they heard that the Drawees were in bad Credit.
 - IV. But what renders the Obligation upon the Appellant intire and unfurmoutable, is his own Letter of the 16th December, acknowledging the Remittance, and promising to accept the Bills if necessary; hereby he became expressly bound to accept them, and the supervenient Bankruptcy of *Annam* and *Colquhoun*, was so far from being a Reason to relieve him from his Obligation to accept the Bills, that it was only on that single Event, that his Acceptance became necessary:—He adds a Condition to his Promise, the Event arrives, and therefore the Promise becomes absolute.
- Objection.* It is objected that this Letter cannot create an Obligation in favour of the Respondents, they not being privy to it.
- Answer I.* As the Bill for the 800*l.* was deposited with the Appellant for the special Purpose of being applied to pay the Bills in question, the Respondents Knowledge of such Deposition was not necessary to give them the Benefit of it; for by the Purchase of the Bills they were entitled to the Benefit of every Fund allotted by the Drawer for the Payment.
- Answer II.* As *de facto* the Respondents, the Day after purchasing the Bills, were informed by *Scott* of the Deposition, and relied upon it; and as the Terms of the Deposition never were altered by *Scott*, the Appellant is equally bound, as if the Respondents had been privy to the original Letter: And the Matter is put beyond Doubt, by the Appellant's Letter of 16th December, wherein he agrees to accept the Bills on the Event which happened.
- V. The Attempt to make this a concerted Fraud between *Scott* and the Respondents, has very justly recoiled upon the Appellant, and subjected him to Costs of Suit. The Correspondence upon which

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which that strange Superstructure is built, is altogether unconnected with the present Case.—The whole Transaction, relating to the Bills in question, depends upon *Scott's* Letter of the 12th December to the Appellant, the Respondents Letters of the 14th to their Correspondents the Holders of the Bills, desiring them to apply to the Appellant for Acceptance, *Scott's* second Letter of the 14th December to the Appellant, explaining his Letter of the 12th; and *Innes* the Appellant's Letter of the 16th promising Acceptance; all the other Correspondence relates to different Transactions; and though it were admitted, that an unfair Attempt had been made to draw the Appellant into a Scrape with *Scott*, yet that can have no Influence in the Determination upon a fair Transaction unconnected with it. But the Nature of this Fraud is truly ridiculous; the Respondents are supposed to inveigle the Appellant to trust *Scott*, by plainly telling him, that they will not trust him themselves, unless he becomes Security for him; and to represent *Annand* and *Colquhoun* in good Circumstances, on the very Hour after they had received Information from the Appellant himself, that they were become Bankrupts. Letters of the kind wrote by the Respondents on the 23d December are very common amongst Merchants. It is hard to stand the Importunity of a Man who wishes to be recommended to the Protection and Support of another; but these Recommendations pass for no more than their real Value. In this Case the Letter had no Effect; for the Appellant paid no Regard to it; and indeed it would have been very strange, if he had trusted a Person upon the Recommendation of those, who in the very Letter declared, that they would not trust him themselves.

JA. MONTGOMERY.

ANDREW CROSBIE.

Die Mercurij 15 Aprilis 1772.

*Order'd and Adjdg'd by the Court That the Appeal be Dismiss'd
and that the Interlog.th therein complain'd of be Affirm'd.*

Mr. William Innes, - - - Appellant.
Messrs. Gibbon and Balfour, Respondents.

The Respondents C A S E.

To be heard at the Bar of the House of Lords, on
the Day of 1772.